Supreme Court, U.S.
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No. 00-1136

IN THE

Supreme Court of the United States

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,

Petitioners,

v.

MISSOURI REPUBLICAN PARTY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did Missouri carry its burden of demonstrating under *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), that limits on the amount of cash and in-kind support provided by political parties to their candidates are closely drawn to prevent corruption or the appearance of corruption?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Opinions Below	1
Statement of the Case	1
Reasons for Denying the Writ	12
Conclusion	22

TABLE OF CITED AUTHORITIES

Page

Cases:

Alaska v. Alaska Civil Liberties Union, 978 P.2d 597 (1999), *cert. denied*, 120 S. Ct. 1156 (2000) ... 14

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Citizens for Responsible Government State Political Action Committee v. Buckley, 60 F. Supp. 2d 1066 (D. Colo. 1999), *vacated in pertinent part*, 2000 WL 1902427 (10th Cir. 2000) 14

City of Erie v. Pap's A.M., 120 S. Ct. 1382 (2000) 13

Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) 1, 16, 18

Fabric v. Provident Life & Acc. Ins. Co., 115 F.3d 908 (11th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998) 21

FEC v. Colorado Republican Federal Campaign Committee, 213 F.3d 1221 (10th Cir.), *cert. granted*, 121 S. Ct. 296 (2000) 12, 17, 18, 22

Landell v. Sorrell, 118 F. Supp. 2d 459 (D. Vt. 2000) 14

Cited Authorities

Page

Mariani v. United States, 212 F.3d 761 (3d Cir.), *cert. denied*, 121 S. Ct. 564 (2000) 17

Nixon v. Shrink Missouri Government PAC, 120 S. Ct. 897 (2000) ..... *passim*

Shrink Missouri Government PAC v. Adams, 151 F.3d 763 (8th Cir. 1998) 3, 4, 5

United States v. Pennsylvania Industrial Chemical Corporation, 411 U.S. 655 (1973) 20

United States v. Playboy Entertainment Group, Inc., 120 S. Ct. 1878 (2000) 13

United States Constitution:

First Amendment 1, 5, 7, 20, 21

Fourteenth Amendment 5

Cited Authorities

	Page
Statutes:	
Mo. Rev. Stat. § 130.011(19)	2
Mo. Rev. Stat. § 130.011(22)	17
Mo. Rev. Stat. § 130.032.1	17
Mo. Rev. Stat. § 130.032.2	4
Mo. Rev. Stat. § 130.032.4	2, 5
Mo. Rev. Stat. § 130.032.7	5, 15
Mo. Rev. Stat. § 130.081	15
Rule:	
United States Supreme Court Rule 15.2	20
Other Authority:	
2000 Colo. Legis. Serv. Ch. 36, § 12 (H.B. 1194, Mar. 15, 2000) (West)	14
Missouri Ethics Commission, Opinion No. 00.05.100 (May 15, 2000)	3
Missouri Ethics Commission, Opinion No. 00.07.101 (July 31, 2000)	15

OPINIONS BELOW

Petitioner inadvertently failed to note this Court's order (No. 00-A241) denying Missouri's application for a stay, which is reported at 121 S. Ct. 31 (2000).

STATEMENT OF THE CASE

The Missouri Republican Party (MRP) is a political party committee organized under Missouri law. The MRP's primary goals are to take control of state government by electing Republican candidates to statewide office and to the state legislature and, in turn, to implement Republican policies and principles. The party's fate is inextricably tied to its candidates. The MRP, like other political parties, can give effect to its views "only by selecting and supporting candidates." *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 629 (1996) (Kennedy, J., Rehnquist, C.J. & Scalia, J., concurring in the judgment and dissenting in part) (*Colorado I*).

Missouri imposes "contribution" limits on the amount of cash and in-kind support that political parties can provide their candidates. These limits substantially interfere with the MRP's ability to recruit candidates, to provide seed money to its candidates, and to "target" its support on particular races critical to party's goal of taking control of state government.

The court of appeals held that these state law limits on political party "contributions" to their candidates violate the First Amendment. The Eighth Circuit expressly recognized this Court's recent determination "the 'quantum of empirical evidence needed to satisfy heightened judicial scrutiny of

legislative judgments will vary up or down with the novelty and plausibility of the justification raised.' " Pet. App. A7 (*quoting Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897, 906 (2000)). Here, however, the justification — "the threat that a political party will corrupt a candidate" — is "novel and not particularly plausible," and "the record is wholly devoid of any evidence that limiting parties' campaign contributions will . . . reduce corruption." *Id.* at A6, A7, A8. There is, moreover, no reason to impose limits on political parties' speech to prevent evasion of limits on individual contributions: the state "already ha[s] a mechanism in place that deals with attempts by individuals to circumvent limits on their contributions by using a political party as a mere conduit." *Id.* at A7.

1. Missouri limits, as "contributions," the amount of both cash and in-kind support provided by political parties to their candidates.[1] Although Missouri does not prevent political parties from making expenditures independently of its candidates, the slightest degree of cooperation, coordination, or consultation between a political party and its candidates

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1. The statute defines an "in-kind contribution or in-kind expenditure" as "a contribution or expenditure in a form other than money." Mo. Rev. Stat. § 130.011(19) (Supp. 1999). It limits "the amount of cash contributions, and a separate amount for the amount of in-kind contributions, made by or accepted from a political party committee" to elect an individual to: $10,000 for the offices of governor, lieutenant governor, secretary of state, state treasurer, state auditor, and attorney general; $5,000 for the office of state senator; $2,500 for the office of state representative; and "[t]o elect an individual to any other office of an electoral district, ward or unit, ten times the allowable contribution limit for the office sought." *Id.* § 130.032.4. In an unopposed primary election, the maximum "contribution" made by a political party is one-half the otherwise applicable limit. *Id.*

makes the party's support a "contribution" subject to the state law limits. *See* Missouri Ethics Commission, Opinion No. 00.05.100 (May 15, 2000) (ruling that "if a candidate participates in the selection of billboard signs or other medium to advertise a website for that candidate, and the candidate has some design, control or influence concerning the website, such billboard expenditure advertising and website expenditure would be considered a contribution from the party to the candidate").

2. In the 1998 general elections, the Missouri Republican Party made cash payments totaling $133,500 to Pierce for Auditor (a Republican candidate for statewide office), cash payments totaling $73,750 to Citizens for Eric Zâhnd (a Republican state senate candidate), and cash payments totaling $8300 to Citizens to Elect Mike Reid (a Republican state house candidate).

a. The MRP provided cash support for its three candidates because it had targeted their races — that is — the party believed that the election of Pierce, Zahnd, and Reid was critical to the party's goal of taking control of the executive and legislative branches of government. If, for example, Zahnd and one more targeted Republican state senate candidate had both won their races, then the MRP would have gained control of the state senate for the first time in the last half of the twentieth century.

b. The party believed that these payments to its candidates were legal and reported them to the Missouri Ethics Commission (MEC). The MRP believed that its contributions were legal because the party limits were based on the individual contributions limits that had been enjoined on July 23, 1998 by the court of appeals. *See Shrink Missouri*

Government PAC v. Adams, 151 F.3d 763 (8th Cir. 1998). The MEC increased the individual contribution limits in the 1998 election cycle from $1000 to $1075, from $500 to $525, and from $250 to $275.[2] The MEC published these new inflation-adjusted limits on individual contributions, but it never published inflation-adjusted limits on political party contributions. Instead, during the 1998 election cycle, the MEC told the MRP that the "party limits are ten times the individual limits."

c. Given the court of appeals' July 23, 1998 order enjoining enforcement of the individual limits, the MRP had a good faith, reasonable belief that there no limits on party contributions — that is — the party limits were "equal to zero multiplied by ten, or zero."[3] Although there were many ways — other than direct contributions to party candidates

2. State law provides that in each even-numbered year "contribution" limits "shall be increased" to take inflation into account and "rounded to the nearest twenty-five-dollar amount." Mo. Rev. Stat. § 130.032.2 (Supp. 1999).

3. As the district court subsequently held, the party limits served no purpose after the limits on individual contributions had been enjoined. Pet. App. A55 ("one of the purported objectives" of the party limits to "thwart[] a person from evading the limit on the amount that he or she can legitimately give to a given candidate . . . ceased to have any force whatsoever" when enforcement of the individual limits was enjoined). Indeed, Missouri subsequently conceded that the state had no reason to enforce the party limits while the individual limits were enjoined in 1998: "Defendants, all state officials, consented to [district court's January 13, 1999 preliminary injunction barring enforcement of the party limits] because the limits on party committee contributions could have little effect so long as individuals and non-party committees could contribute unlimited amounts directly to candidates." Appellees' Opposition to Appellants' Motion for Injunction Pending Appeal (July 14, 2000) at 2.

— that Missouri Republicans could have supported the Pierce, Zahnd, and Reid campaigns without raising any risk of legal action by Missouri, the MRP, acting in reliance on the MEC's statements, provided support directly and openly to its candidates.

3. After the MRP and its candidates reported the contributions at issue, the MEC determined that state law (Mo. Rev. Stat. § 130.032.4) prohibited the party from making cash payments in the general election of more than $10,750 to its statewide candidate, of more than $5375 to its state senate candidate, and of more than $2700 to its state house candidate. The MEC initiated enforcement proceedings, and it is now seeking penalties under Mo. Rev. Stat. § 130.032.7 in the amount of $201,725 from the MRP, $126,750 from Pierce, $68,375 from Zahnd, and $6,600 from Reid.

4. The Missouri Republican Party and its three candidates filed a complaint on November 16, 1998 and set up two separate civil rights violations.

a. First, they alleged that Mo. Rev. Stat. § 130.032.4, which restricts the amount of financial support provided by a political party to its candidates, violated their First Amendment rights of political speech and association.

b. Second, they alleged that enforcement of the party limits, which Missouri had calculated on the basis of individual contribution limits then enjoined under the July 23, 1998 Order of the court of appeals, *see Shrink Missouri Government PAC v. Adams*, 151 F.3d 763 (8th Cir. 1998), deprived them of their First and Fourteenth Amendment rights and of their liberty and property without due process of law in violation of the Fourteenth Amendment.

5. On January 13, 1999, the district court, the Honorable Catherine D. Perry, entered an order enjoining enforcement of the party contribution limits. Pet. App. A49. On March 1, 1999, Judge Perry entered another order staying the proceeding until the Court's decision in *Nixon v. Shrink Missouri Government PAC*.

6. The Court decided *Nixon* on January 24, 2000, *see* 120 S. Ct. 897 (2000), and upheld Missouri's $1075 limit on contributions by individuals and political action committees (PACs) to candidates.

7. On March 13, 2000, the district court denied Missouri's motion to vacate the preliminary injunction and set the case "for expedited briefing and a hearing on the merits." Pet. App. A58; *id.* at A59. The case, however, did not go to trial. On June 22, 2000, just as all pretrial matters were being completed and just two weeks before the trial set for July 5th, the district court granted Missouri's summary judgment motion. Pet. App. A19-A43.

8. The district court held that Missouri's limits on political party "contributions" were constitutionally valid under *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000). Pet. App. A19.

a. The district court found that there were no factual issues precluding summary judgment and that the party's cash support for its candidates should be labeled a "contribution" as a matter of law.[4] Pet. App. A22.

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4. Although Missouri limits the amount of both cash and in-kind contributions (*see* note 1 *supra*), the district court did not consider the limits on in-kind contributions. Pet. App. A23-A25.

b. It held that "contribution limits on political parties are evaluated under the same standards applied to contribution limits on individuals." Pet. App. A31.

c. Under *Nixon*, "Missouri's campaign contribution limits on political parties do not violate the First Amendment" because they are not " 'so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless.' " *Id.* at A38-A39 (*quoting Nixon*, 120 S. Ct. at 909).

d. Judge Perry recognized, nonetheless, that if she were "writing . . . on a blank slate," she "might well" have held "that political parties should be exempted from the legal standards governing other kinds of campaign contributors." Pet. App. A41.

e. The district court did not address the MRP's claim that it had relied on the MEC's interpretation of the statute and that subsequent enforcement of the party limits deprived the party of its liberty and property without due process of law.

9. The court of appeals reversed the district court's judgment and ordered the lower court to enter an injunction barring enforcement of party contribution limits. Pet. App. A8; *see id.* at A1-A16. Judge Morris S. Arnold, joined by Judge Pasco M. Bowman, held that the Missouri statutes limiting the amount of both cash and in-kind "contributions" made by political parties to their candidates violate the First Amendment on their face. *Id.* A1-A8. Judge John R. Gibson concurred in part and dissented in part. *Id.* at A9.

a. The majority acknowledged that the line between contributions and coordinated expenditures is "particularly difficult to discern when the case involves money that passes from a party to one of its candidates." *Id.* at A3. It held, nonetheless, that the cash payments made by the MRP to three of its 1998 candidates were "contributions as a matter of law" because the candidates had physical possession of the party's funds. *See id.* (noting candidates' statements that "although they discussed the use of the money with the party before it passed to them, they were nevertheless free to spend it as they saw fit").

b. Having characterized the MRP's support as a "contribution," the court of appeals recognized that there was no ready analogy between political party contributions and the individual contributions at issue in *Buckley v. Valeo*, 424 U.S. 1 (1976) and in *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000). Pet. App. A4-A6. In *Buckley*, as the court of appeals recognized, the Court upheld limits on an individual's contributions because these limits imposed " 'only a marginal restriction upon the contributor's ability to engage in free communication.' " *Id.* at A4 (*quoting Buckley*, 424 U.S. at 20-21). In *Buckley*, the Court found that an individual's " 'contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support' " and that a limit on such contributions " 'involves little direct restraint on . . . political communication, for it permits the symbolic expression . . . evidenced by a contribution.' " *Id.* (*quoting Buckley*, 424 U.S. at 21).

c. The considerations that supported individual contribution limits in *Buckley*, however, "simply do not carry the

same force when the contributor is a political party." *Id.* As the court of appeals explained,

> The main object of a political party is to elect its candidates to office, and, in large measure, the speech of its candidates is its own speech. While political parties employ various methods to speak, a principal way in which they express themselves is through the speech of their candidates. In fact, parties and their candidates are often virtual alter egos.

Id. at A4-A5. Given "their unity of purpose, and the virtual identity of parties and their candidates,"[5] the Eighth Circuit found that "it is not easy to say, in the words of *Buckley* . . . that a political party's contribution 'does not communicate the underlying basis for the support.' " *Id.* at A5 (*quoting Buckley*, 424 U.S. at 21).

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5. The Eighth Circuit recognized that "there is [not] always an exact one-to-one correspondence between candidates and their parties." Pet. App. A5. Nonetheless, it found that:

> parties seek to field a team and support it. Candidates are frequently, moreover, and with excellent reason, called their party's standard- bearers, and they make frequent appeal to party principle; and in their interactions, candidates and parties influence each other and become more alike, so as to present a coordinated and common front. They are often, in other words, virtually indistinguishable from each other, and their identities are merged in a way that makes dealings between them more than merely transient symbiotic ones between separate and distinct entities.

Id.

Instead, "a party's contribution provides an ideological endorsement and carries a philosophical imprimatur that an individual's contribution does not, and thus it cannot properly be called a 'contribution' in the same sense that the individual contributions at stake in *Buckley* were." *Id.* Moreover, "a party's contribution to its candidate, again in the words of *Buckley* [is not] merely a 'symbolic expression' of support; it is more like a substantive political statement than others' contributions are." *Id.* (*quoting Buckley*, 424 U.S. at 21). Thus, "the first amendment rights at stake [in limits on political party contributions] are different from, and weightier than, those that were involved in *Buckley*." *Id.* at A5-A6.

d. Notwithstanding the fundamental differences between individual contributions and political party contributions, the Eighth Circuit expressly recognized this Court's determination in *Nixon* that "the 'quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.' " *Id.* at A7 (*quoting Nixon*, 120 S. Ct. at 906). Here, however, the state's justification — "the threat that a political party will corrupt a candidate" — is "novel and not particularly plausible." *Id.* at A6, A8. Missouri, moreover, had no evidence that a political party's "contributions" cause corruption or the appearance of corruption. *Id.* at A7 ("the record is wholly devoid of any evidence that limiting parties' campaign contributions will . . . reduce corruption").

e. Missouri's contention that preventing the circumvention of limits on individual contributions justifies limiting the size of a political party's contributions fared no better than its anti-corruption rationale. Pet. App. A6-A7. The court of appeals recognized that *Buckley* had upheld a $25,000 limit

on total individual contributions *to* federal candidates, national party committees and other political committees on the ground of preventing evasion of the federal $1000 limit on individual contributions to candidates. *Id.* at A6 (*citing Buckley*, 424 U.S. at 38). *Buckley*, however, does not provide any authority for limiting the size of contributions made *by* political parties to their candidates. As the Eighth Circuit explained, *Buckley* "upheld a limitation on the total amount that any one person could contribute on the ground that it would keep individuals from circumventing the limits on giving to any one candidate." Pet. App. A6 (*citing Buckley*, 424 U.S. at 38). In the case of Missouri's "contribution" limit, however, "the challenged restriction is on the party's giving, and the [government] seek[s] to justify it on the ground that it would keep individuals from doing an end run around limits on their own giving." *Id.* As the Eighth Circuit held, imposing "burdens [on] the free speech rights of political parties in order to control the activities of someone else [an individual contributor]" is "something quite different from what *Buckley* approved." *Id.* at A6-A7.

f. Even if, as Missouri suggested, some individuals attempt to circumvent limits on individual contributions to candidates by making "earmarked" contributions to political parties for particular candidates, there is no reason to limit political parties' freedom of speech. Missouri "already ha[s] a mechanism in place that deals with attempts by individuals to circumvent limits on their contributions by using a political party as a mere conduit." *Id.* at A7. As the Eighth Circuit explained, "it would be illegal under Missouri law for an individual and a political party secretly to agree that the party would pass along the individual's contribution to a candidate after that individual had already contributed the statutory maximum" and any such "earmarked" contribution would be subject to the limits on individual contributions. *Id.*

g. Judge John R. Gibson would have upheld Missouri's limits on the amount of cash and in-kind support provided by political parties to their candidates. *Id.* at A15-A16 & A16 n.2. Judge Gibson concurred in the majority's determination that the MRP's support for its candidates should be labeled "contributions." *Id.* at A9. In his view, however, "contributions made by a political party are no different than contributions made by individuals or other groups." *Id.* at A15. Judge Gibson found that Missouri had not tried to justify the party limits on the ground that a political party's contributions to its own candidates cause corruption or the appearance of corruption. *Id.* at A14 & n.1. Nonetheless, he would have upheld the limits on political parties as a means of preventing evasion of individual contribution limits. *Id.* at A14-A16.

10. The court of appeals denied Missouri's motion for a stay (Pet. App. A17), and this Court denied Missouri's application for a stay. *Nixon v. Missouri Republican Party*, 121 S. Ct. 31 (2000) (No. 00-A241).

REASONS FOR DENYING THE WRIT

Petitioners have not presented any question that warrants this Court's review. The Court's decision in *FEC v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221 (10th Cir.), *cert. granted*, 121 S. Ct. 296 (2000) (No. 00-191) (*Colorado II*), is not likely to create any reason to question the Eighth Circuit's application of *Nixon* to limits on the amount of financial support provided by Missouri political parties to their candidates.

1. The case does not present any significant question whether the court of appeals correctly applied *Nixon*. The Eighth

Circuit recognized that *Nixon* upheld limits on campaign contributions by individuals and PACs and that this case involved limits on political party contributions. Pet. App. A3-A6. The court of appeals, nonetheless, followed this Court's direction in *Nixon* that the " 'quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.' " *Id.* at A7 (*quoting Nixon*, 120 S. Ct. at 906)). Applying this standard, the court of appeals found that the state's justification — "the threat that a political party will corrupt a candidate" — is "novel and not particularly plausible" and that "the record is wholly devoid of any evidence that limiting parties' campaign contributions will . . . reduce corruption." *Id.* at A6, A7, A8.

Missouri did not make any showing that the support provided by political parties to their candidates causes corruption or even an appearance of corruption. The Court, of course, has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon*, 120 S. Ct. at 907; *see City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1403 (2000) (Souter, J., concurring in part and dissenting in part) (same); *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1891 (2000) (when government regulates speech to protect children from exposure to indecent materials it "must present more than anecdote and supposition"). Thus, the court of appeals held correctly under *Nixon* that the state had not carried its burden of justifying limits on party contributions.[6]

6. Neither *Nixon* nor *Buckley* excuses Missouri from its burden of making some showing that a political party's support for its candidates causes corruption or the appearance of corruption. (Cont'd)

2. Missouri's suggestions of conflict are strained. Pet. 20, 21-23. Although one lower federal court upheld Colorado's $10,000 to $400,000 limits on political parties' "contributions" to their candidates, the Colorado legislature repealed these limits, and the Tenth Circuit vacated the district court's judgment. *Citizens for Responsible Government State Political Action Committee v. Buckley*, 60 F. Supp. 2d 1066, 1093-97 (D. Colo. 1999), *vacated in pertinent part*, 2000 WL 1902427 *2, *21 (10th Cir. 2000); 2000 Colo. Legis. Serv. Ch. 36, § 12 (H.B. 1194, Mar. 15, 2000) (West). Similarly, although another lower federal court approved limits on party contributions to candidates in principle, it held that the particular $200, $300, and $400 limits were "too low to pass constitutional muster." *Landell v. Sorrell*, 118 F. Supp. 2d 459, 484-87 (D. Vt. 2000). One state court has considered limits on political party contributions. The Alaska Supreme Court upheld $5000 to $100,000 limits on political party "contributions" to candidates, but it did so in a very cursory fashion. *Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 625-26 (1999), *cert. denied*, 120 S. Ct. 1156 (2000).

(Cont'd)

In *Nixon*, the Court permitted the state to rely on *Buckley* for the proposition that a $1000 contribution made by an individual to a candidate may cause corruption or the appearance of corruption, and it excused the state from making any additional evidentiary showing. 120 S. Ct. at 906-08. *Buckley*, however, did not address any question about the validity of limits on the financial support provided by a political party to its candidates. 424 U.S. at 58 n.66. Thus, *Nixon's* rejection of the state's duty to prove beyond *Buckley* that individual contributions cause corruption or the appearance of corruption simply does not address the separate, distinct question in this case: whether the financial support provided by Missouri political parties to their candidates causes either corruption or the appearance of corruption.

3. Missouri's assertions about the effects of the court of appeals' judgment are mistaken.

a. The state asserts that the court of appeals judgment "eliminates Missouri's ability to restrict the flow of large sums of money to candidates through party committees." Pet. 20. This assertion, however, completely ignores the court of appeals' finding that Missouri "ha[s] a mechanism in place that deals with attempts by individuals to circumvent limits on their contributions by using a political party as a mere conduit." Pet. App. A7. Missouri conceded, as the court of appeals held, that "it would be illegal under Missouri law for an individual and a political party secretly to agree that the party would pass along the individual's contribution to a candidate after that individual had already contributed the statutory maximum." *Id.* Even if, as Missouri suggests, party spending increased from 1997-98 to 1999-2000 because individuals channeled contributions through political parties (Pet. 20),[7] the state has a simple solution: enforce the limits on individual contributions with civil and criminal enforcement actions. Mo. Rev. Stat. §§ 130.032.7 (Supp. 1999), 130.081 (1994); *see* Missouri Ethics Commission, Opinion No. 00.07.101 (July 31, 2000) (holding that

7. There are, of course, many possible explanations for substantial increases in the amount of support provided by state political parties to their candidates in the 2000 elections. Missouri, for example, was widely viewed as a critical "swing" state in the 2000 Presidential elections. Missouri law does not limit contributions to state political parties, and the national parties may have provided their state counterparts with substantial funds to build support for their whole — national and state — tickets. In any event, Missouri's speculation about increases in party spending in the 2000 elections is just that: speculation. Missouri's data about political party spending through the November 2000 general elections (Pet. 20) were assembled long after the decisions of the courts below.

"candidates cannot request contributions be made to political party committees with the express purpose of passing those contributions through the committee to the candidate"). Thus, as the court of appeals recognized (Pet. App. A6-A7), there is no reason to limit the amount of support provided by political parties to their candidates as a means to control the activities of individual contributors.[8]

b. Missouri's assertions about the potential effects of the court of appeals' judgment on federal campaign finance regulation are also mistaken. Pet. 21, 24. The Missouri and the federal regulatory schemes are fundamentally different. Missouri, for example, does not prohibit either corporate or union contributions to candidates,[9] and it does not impose any limits

8. The Court has recognized that certain contribution limits work to protect the integrity of other contribution limits. In *Buckley*, for example, the Court upheld a $25,000 limit on total individual contributions *to* federal candidates, national party committees and other political committees on the ground of preventing evasion of the federal $1000 limit on individual contributions to candidates. *Buckley*, 424 U.S. at 38. *Buckley*, however, does not provide any authority for limiting the size of contributions made *by* political parties to their candidates. The Court has never held, much less even suggested, that limits on the financial support provided *by* a political party to its candidates are a constitutionally valid means of preventing evasion of a limit on individual contributions. In fact, quite to the contrary, when Justice Breyer suggested the possibility of limits on contributions *to* a political party as a means of preventing evasion of individual contribution limits, he also recognized that limits on spending by a political party would impose a "markedly greater burden." *Colorado I*, 518 U.S. at 617 (Breyer, J., O'Connor, J., & Souter, J.) (internal quotation marks and citation omitted).

9. Missouri allows all "persons," including corporations and unions, subject to the limits upheld in *Nixon*, 120 S. Ct. 897, to make (Cont'd)

on the amount of money that individuals, corporations, unions, PACs or others can contribute to political parties. Federal law, however, prohibits corporations and unions from using funds in their corporate treasuries to contribute to or make expenditures in connection with advocating the election or defeat of any candidate for federal office. *See Mariani v. United States*, 212 F.3d 761, 769-770 (3d Cir.), *cert. denied*, 121 S. Ct. 564 (2000). Federal law also limits the amount of money that individuals can contribute to political parties for federal elections.[10] Given these fundamental differences between the two regulatory schemes, it simply does not follow, as Missouri would have the Court believe, that the Eighth Circuit's "holding will be binding when someone challenges the FECA limits on party contributions." Pet. 21.

4. The Court should decline Missouri's invitation to "bridge the gap" between *Nixon* and *Colorado II*. Pet. 19. In Missouri's view, this case bridges the gap between *Nixon* (limits on individual and PAC "contributions") and *Colorado II* (limits on "coordinated expenditures" made by political

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(Cont'd)
campaign contributions to candidates. *See* Mo. Rev. Stat. § 130.032.1 (Supp. 1999) (limiting campaign contributions by "persons" other than the candidate); *see id.* § 130.011(22) (defining the term "person" to include corporations and unions).

10. Although corporations and unions cannot make so-called "hard money" contributions to political parties for use on behalf of federal candidates, they can make unlimited "soft money" contributions to political parties for other purposes such as issue advocacy. *See Mariani*, 212 F.3d at 767-68. Since Missouri does not impose any limits on the amount of money that corporations or unions can contribute to political parties for any purpose, the federal distinction between "hard money" and "soft money" has no office in Missouri campaign finance law.

parties) because it addresses limits on "contributions" made by political parties to their candidates. *Id.* The gap — constructed out of the state's labels — is more apparent than real. In the context of the support provided by political parties to their candidates, there are no real differences between party "contributions" and party "expenditures." Even assuming that this distinction could be drawn, there is a substantial question in this case whether the court of appeals properly labeled the support provided by the MRP to its candidates "contributions" instead of "expenditures."

a. There is no difference — much less a constitutionally significant difference — between cash "contributions" made by a political party in cooperation with its candidates and cash "expenditures" made by a political party in cooperation with its candidates.[11] The MRP, for example, could make a payment of $133,500 to its candidate for state auditor to purchase television time for a specific advertisement as discussed by the party with its candidate, or the party could make a direct payment of the same sum to television stations to purchase television time for the same advertisement. The first alternative — the MRP's "donation" or payment to

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11. The Federal Election Campaign Act confirms the fundamental point that political party expenditures and contributions are indistinguishable. As Justice Breyer noted in *Colorado I*, federal law treats contributions as the equivalent of expenditures: the FECA regulates political party *expenditures* in support of its candidates as an exception to otherwise applicable *contribution* limits. *See* 518 U.S. at 610-12 (Opinion of Breyer, J., O'Connor, J., & Souter, J.). Thus, in *Colorado II*, the court of appeals measured federal limits on a political party's "coordinated expenditures" by the *Nixon* standard of scrutiny of "contribution" limits because the "FECA treats coordinated expenditures as 'contributions.' " 213 F.3d at 1226-27 (citation omitted).

its candidate — could easily be labeled a "contribution", and the second alternative — the party's "direct payment" of its candidate's media bills — could easily be labeled an "expenditure." Any distinction, however, between (1) passing the party's funds through a candidate's campaign committee to purchase television time and (2) purchasing television time directly for the same advertisement elevates form over substance.

b. Even if a political party's support for its candidates can be divided into "contributions" and "expenditures," there is a substantial question whether the court of appeals correctly found that "there was no genuine factual dispute about the nature of the monetary expenditures involved." Pet. App. A3. The Eighth Circuit held that cash payments made by the MRP to three of its 1998 candidates were "contributions as a matter of law" because the candidates had physical possession of the party's funds. *Id.* The Court relied on the candidates' statements that "although they discussed the use of the money with the party before it passed to them, they were nevertheless free to spend it as they saw fit." *Id.*

There is, however, no real difference between a "contribution" of party funds to a candidate to purchase campaign goods and services and a direct party "expenditure" to purchase the same goods and services for the candidate. The MRP makes cash payments to its candidates for specific purposes determined by the party in consultation and cooperation with its candidates and their committees. Although candidates theoretically can spend the party's funds as they "see fit" because their committees have physical custody of the party's funds, the MRP has no need to make a contract with its candidates in order to ensure that the party's funds are spent as discussed and to achieve the party's goal of taking control of state government. The MRP, in

short, can trust its candidates to use the party's funds as the candidate and the party have discussed.

5. If the Court grants the petition, the issues before the Court would include an important due process issue as well as First Amendment issues. Missouri states that "[t]he party limits were not challenged in *Shrink Missouri*, and thus their enforcement was not subject to the injunction in that case." Pet. 16, n.4. This statement, albeit technically correct, does not address the MRP's claim that the Missouri Ethics Commission (MEC) misled the MRP into believing that there were no enforceable limits on party contributions. As required by Rule 15.2 of the Rules of this Court, respondents note that Missouri's statement should not be read to preclude the MRP from raising the issue, apart from the validity of the party limits under the First Amendment, that the MEC violated the party's due process rights to fair warning and notice and to rely on the MEC's interpretation of the statute.[12] *See, e.g., United States v. Pennsylvania Industrial Chemical Corporation*, 411 U.S. 655, 674 (1973) (rightful reliance on agency interpretation even though conduct violated letter of the law).

6. The Court should deny the petition in order to avoid a substantial risk of unnecessarily deciding constitutional

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12. The MRP's reasonable, good faith belief, in reliance on the MEC's statements, that the party limits were not enforceable is borne out by the fact that the Missouri Democratic Party (MDP) also made contributions in excess of the party limits. *See* Response To Missouri's Application For Stay Pending Petition For Writ Of Certiorari (No. 00-A241) (Exh. #1, Affidavit of John Hancock, at 18-19) (stating that the MDP made contributions in excess of the party limits in the 1998 elections and that the MEC had not pursued violations of the party limits by the MDP).

issues. The court of appeals' decision reversing the district court's order granting the state's motion for summary judgment was in effect a summary judgment for MRP. *See Fabric v. Provident Life & Acc. Ins. Co.*, 115 F.3d 908, 914-15 (11th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998) (recognizing that the power of a court of appeals to direct entry of summary judgment for a non-moving party is well-settled). In this posture, there are many unresolved issues that, notwithstanding review by this Court, would control the ultimate outcome.

a. For example, given the court of appeals' holding that both cash and in-kind party contribution limits violate the First Amendment "on their face," Pet. App. A8, it did not have any occasion to consider whether the district court had erred in applying *Nixon* to assess the effects of the party limits on *candidates* instead of assessing the effects of the party limits on political parties.

b. Similarly, the court of appeals did not have any occasion to determine whether the state had carried its burden of demonstrating that there were no genuine issues of material fact that the party limits (1) reduce the number of candidates in primary elections and reduce spending in primary and general elections, (2) interfere with the MRP's ability to use primaries to field its best candidates, (3) prevent the MRP from providing seed money necessary to recruit candidates, (4) force the MRP to support its candidates by independent expenditures that are not as effective as coordinated expenditures, and (5) have a systemwide effect of suppressing political advocacy under *Nixon* because the goals of the MRP are systemwide — to take control of state government and to implement the party's policies on a statewide basis.

7. Finally, the Court's decision in *Colorado II* is not, contrary to Missouri's suggestions, likely to create any reason either to remand this case to the Eighth Circuit or to review another party finance case. Pet. 24-25. Although it is common ground for both the Tenth Circuit and the Eighth Circuit that there is no direct analogy between individual campaign contributions and a political party's contributions to its candidates, the Eighth Circuit's judgment rests on a simple, straightforward finding under *Nixon* that "the record is wholly devoid of any evidence that limiting parties' campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals' campaign contributions are circumvented." Pet. App. A7.

CONCLUSION

The petition for writ of certiorari should be denied.

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